F.M.S. REPORTS

[APPELLATE CIVIL JURISDICTION]
TERRELL, Ag. C.J.
October 9, 1936.

ABDUL RAHMAN BIN ABDUL KADIR .....Appellant.

v.

PAIJAH BINTI TWANGSA, ADMINISTRATRIX OF THE ESTATE OF UNUS BIN BASIAH .....Respondent.

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 10 of 1936.]

The Civil Procedure Code (Cap. 7) section 96—Omission to verify a written statement is a mere irregularity—The Limitation Enactment (Cap. 18) section 3—Setting up defence of limitation by unverified written statement.

In a suit on a promissory note the defendant filed an informal document by way of a written statement of defence. This document was not verified as required by section 96, Civil Procedure Code and concluded with the following sentence:—

"I finally ask your Worship to consider the date of expiry of the note concerned and dismiss the case."

Held, that the plea of limitation was clearly raised and that the omission to verify such document under section 96 of the Civil Procedure Code was an irregularity which did not preclude such document from being regarded as an effective pleading.

R. Ramani for the appellant.

C. Mills for the respondent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The promissory note sued on is dated the 16th June, 1930, and was in favour of one Unus bin Basiah. Unus died on the 17th June, 1933, and the plaintiff is his administratrix. No payment of interest or on account of principal is alleged, and the claim on the promissory note is accordingly barred, provided that limitation has been set up as a defence in accordance with the provisions of section 3 of the Limitation Enactment (Cap. 18).

The only defence set up is the very informal document given on page 6 of the record, which purports to be signed by the defendant, but is not verified by him, as required by section 96 of the Civil Procedure Code (Cap. 7). It is argued by the respondent that as the written statement was not verified, it ought to have been rejected under the concluding words of the same section, which are as follows:—

"No written statement shall be received unless it is so signed and verified."

But while this is no doubt so, it appears to me that the failure to verify the written statement is an irregularity which could be cured at any time.

In the case of *Grey* v. *Kong*, 1 F.M.S L.R. 162, the defendant never appeared, but upon being served with the summons, merely wrote to the Registrar stating, by way of defence, that the suit was barred by limitation. The Court of Appeal, Sir Thomas Braddell C.J.C., and Edmunds J., held that effect should be given to that plea, and treated the letter as a 'written statement' within the meaning of section 87 of the Civil Procedure Code 1902 (now section 91). In the Civil Procedure Code of 1902 there was a provision, section 104, which is identical with section 96 referred to above, and required the rejection of a statement not properly verified, but it was never argued that the failure to verify the letter sent to the Registrar rendered it inadmissible, and the point is not referred to in the judgment of the Court.

Under the Civil Procedure Code of India Or VI rr. 14 and 15, a pleading which includes a written statement, must be both signed and verified, although there is no provision that the Court shall reject the pleading if these requirements are not fulfilled. It has, however, been held, in most of the Indian High Courts, that the omission to verify a pleading is a mere irregularity which can be cured at any later stage, or in the case of a plaint, even after the expiry of the limitation period. It is clear, therefore, that the pleading is regarded as an effective pleading, notwithstanding the irregularity, see *Shib Deo Misra* v. *Ram Prasad*, A.I.R. (1925) All. 79, 80, 81.

In the present case the defendant's so-called statement of defence concluded with the following sentence:—

"I finally ask your Worship to consider the date of expiry of the note concerned and dismiss the case."

It appears to me that the plea of limitation is clearly raised, and, upon the facts alleged, must equally clearly succeed.

The decree will accordingly be set aside. The defendant will be entitled to his costs here and below.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]
TERRELL, Ag. C.J.
October 16, 1936.

MUNUSAMY .....Appellant

v.

PUBLIC PROSECUTOR.....Respondent.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 59 of 1936.]

The Minor Offences Enactment (Cap. 46) section 35 (i)—Fraudulent possession of property—Property reasonably suspected of being stolen—Duty of prosecution to prove to the satisfaction of the Court that there exist reasonable grounds for suspicion.

Under section 35 (i) of the Minor Offences Enactment, (Cap. 46) it is for the Court to be satisfied that the circumstances were such that the police officer had grounds for suspicion that the property in the accused's possession was stolen property and that such suspicion was reasonable.

Unless those conditions can be shown to have been fulfilled the accused should not be called upon for an explanation.

Queen-Empress v. *Dhanjibhai Edulji*, I.L.R. 20 Bom. 348 applied.

Appellant in person.

H. C. Willan, Deputy Legal Adviser, for the respondent.

TERRELL, AG. C. J.—The sub-section under which the accused was charged was section 35 (i) of the Minor Offences Enactment (Cap. 46) which reads as follows:—

> "Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine of $50, or to imprisonment for three months."

The sub-section is identical in form with section 34 (i) of the Minor Offences Enactment Ordinance of the Colony (Cap. 24) which was first enacted in the Colony as Ordinance 13 of 1906, replacing the Indian Police Act of 1856 which had previously been law in the Colony.

The accused was an odd job man employed at the Coliseum in Kuala Lumpur. He had had several previous convictions and was well known to the police. His last conviction was in December 1935 when he was sentenced to 3 months R. I. and 12 months police supervision. He was accordingly still subject to police supervision on the 9th August 1936.

On that day the accused and two others were brought before the Asiatic Inspector at Campbell Road police station "for enquiries in a certain report." The evidence does not disclose how proceedings were initiated. It is possible that the Inspector sent for the appellant upon a report made by an informer. The only witness for the prosecution was the Asiatic Inspector, and he of course was not in a position to say what were the circumstances or what was the conduct of the accused which gave rise to 'a reasonable suspicion that the accused was in possession of stolen property.'

The attitude of the Inspector himself was extremely simple. In cross-examination he said "Because of the knowledge I had of his antecedents and whereabouts, I suspected the property to be stolen." That is to say the knowledge that the accused had previously been convicted raised in the mind of the Inspector the presumption that any property found on the accused—in this case a wrist watch and a sum of money—must have been stolen property. It is true that there was no evidence that either the wrist watch or the money had been stolen, but this was a detail which caused no difficulty either to the Inspector or to the learned Magistrate. I pass over the fact that the answer given by the Inspector clearly indicated a previous conviction, and may accordingly have prejudiced the mind of the learned Magistrate, as the answer may have been elicited by an incautious question by accused's counsel, but what it does show is that the Inspector became immediately satisfied of the accused's guilt. The accused accordingly is in the position that if he has anything more than a few cents in his possession, he is liable to be pounced upon and charged with being in possession of stolen property and that if he is so charged, his record will result in his conviction. It is hardly necessary to point out that if this is the law, a man who has been unfortunate enough to have been previously convicted is liable to suffer the grossest injustice, and that the opportunities for extortion on the part of unscrupulous informers are unlimited.

Now I have quoted the section and it will be seen that the accused must be in possession of property which may be reasonably suspected of being stolen. The charge, however, was that he was "in possession of suspected stolen property." In view of the facts as detailed above, it is not surprising that the word 'reasonable' was omitted, but the effect is in any case enough to vitiate the whole proceedings, as the omission of this important word is not a mere technicality but goes to the root of the Magistrate's jurisdiction.

It is for the Court to be satisfied that the circumstances were such that the police officer had grounds for suspicion that the property in the accused's possession was stolen property and that such suspicion was reasonable.

Unless those conditions can be shown to have been fulfilled the accused should not be called upon for an explanation.

The following passage from the judgment of the Court in *Queen-Empress* v. *Dhanjibhai Edulji*, I.L.R. 20 Bom. 348, may be cited. The judgment was delivered upon an application for revision under section 35 of the Indian Police Act of 1856, upon which section 35 of the Minor Offences Enactment is based. At page 349 Jardine, J. says:—

> "It being a penal Enactment which shifts the burden of proof of innocence at a certain point on to the accused, it has to be construed strictly. We are of opinion that before the accused can be called on to account for the property, there must be evidence amounting to proof to the satisfaction, not of the police officer or witness, but of the Court, that the accused possessed or conveyed a thing, of which this may be predicated—we mean after judicial consideration of the Court—viz. that the thing 'may be reasonably suspected of being stolen or fraudulently obtained.' This phrase is used as an adjective and unless it applies, accused ought not to be called upon to account nor to be convicted.....
>
> In the present case no evidence was given that any theft of articles of the sort found with the accused had taken place at

> the docks, nor that the accused had been seen under any circumstances of suspicion near the place where the merchants keep such things, or had concealed the things found with him, or that they were articles of a sort so unique or strange or precious as might arouse reasonable suspicion of his honesty.....
>
> That case—*Reg.* v. *Spencer*, 3 F. F. 857—makes it doubtful whether in the case now before us the police were justified in making the search. The ground of suspicion is not disclosed in the evidence."

With these observations I respectfully agree, and every one of them is opposite to the case now before me.

As regards local decisions, there are only two which have been reported, and neither of them cover the exact point now before the Court. They were both decisions under the Indian Police Act of 1856 which was then law in the Colony. In *Reg.* v. *Kwek Chong Seng*, 6 S.S.L.R. 35, it was held that the possession contemplated by the section must be possession in the streets or in a public place and not possession in a house. In the course of his judgment Sir Lionel Cox, C.J. says at page 40 " the offence created by section 35 (i) of the Indian Act is one of an exceptional nature, and the section must be strictly construed."

In the case of *King* v. *Chan Ah Soo*, 7 S.S. L.R. 85, counsel for the appellant argued (page 87) that there must be evidence to show that a theft has taken place, although it was not necessary to prove that the property in question was the identical property stolen. The appeal, however was allowed on the ground that the Bench Court which heard the case had no jurisdiction, and it became unnecessary to give a decision on the other points raised. Sir William Hyndman Jones, however, at page 91 emphasises once more that the Act should not be invoked except in those cases to which it is strictly applicable.

For the above reasons I was of the opinion that the conviction was wrong and could not be sustained. The appeal, therefore, was allowed, the conviction quashed and the sentence (of which the accused has already served 6 weeks) set aside. I ordered that the property taken from the accused should be returned to him.

Appeal allowed.